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ABSTRACT

Constant progress and change in the law of higher education have necessitated this update of the original 1972 edition of this document (the original appeared with the same title) and its first updated supplement. Approximately 60 court decisions are cited that deal with students and their relationship to their colleges. Specific areas discussed include the obligation of divorced parents to pay college expenses; student admission; race and sex discrimination; exclusion for academic reasons; activity fees; differential tuition fees for out-of-state students; some aspects of student financial aid; various facets of student life; dormitory residents; search and seizure; confidentiality of student records; torts against students; freedom of speech; student organizations; freedom of student press; due process in disciplinary proceedings; disciplinary rules; state statutes applied to campus disruptions; and executive, judicial, and grand-jury overkill. (JMF)

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1976
UPDATING SUPPLEMENT
to

The Colleges and the Courts

THE DEVELOPING LAW OF THE STUDENT AND THE COLLEGE

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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1976

UPDATING SUPPLEMENT

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THE COLLEGES AND THE COURTS:

THE DEVELOPING LAW OF THE STUDENT AND THE COLLEGE

by

M. M. Chambers

Department of Educational Administration

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Normal, Illinois 61761

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PREFACE

The current period of progress and change in the law of higher education continues. The first printing of the 316-page volume, *The Colleges and the Courts: The Developing Law of the Student and the College*, was in 1972. The first updating supplement was prepared and placed as an appendix in the 1973 companion volume on *Faculty and Staff Before the Bench*, and is also reproduced in the second printing of the 1972 volume.

This 1976 updating is thus the second supplement to the 1972 volume. Its twenty sections correspond to the chapter titles in that volume. There is something new for each one except "The Speaker Ban Furor," which is now a dead or dormant issue; and "Selective Service" is omitted entirely, as a matter of only historical interest having no current impact.

This supplement mentions only approximately 60 court decisions. The number reported during the past three years is considerably more than that. Selectivity has been used to omit groups of cases that cluster about an issue that seems now to have been settled by a more recent definitive judgment of a high court of appeals or a court of last resort, as in the case of the litigation about the classification of students as residents or nonresidents of a state for tuition fee purposes, and the authority of a state university to require reasonably defined classes of students to reside and eat their meals in university-operated dormitories and dining halls.

The aim is to make the sections as brief and concise as possible without being too cryptic. The reader can judge whether this has been accomplished. In any event, the ongoing developments can scarcely fail to be of keen interest to thoughtful persons concerned in any way with the present and future of higher education in the United States.

1. OBLIGATION OF DIVORCED PARENTS TO PAY COLLEGE EXPENSES

For half a century, since the early 1920's, decisions of the courts in many states on the responsibility of a divorced parent to pay the college expenses of a child or children composed an interesting and enlarging story which was recounted in brief installments in each of the eight successive volumes under the general title of *The Colleges and the Courts* which preceded this present discourse.[1]

The probability of marked change in the development of the law in that sphere came into the picture with the accelerated trend among the states to lower the age of majority from 21 to 18, stimulated by the adoption of the Twenty-sixth Amendment to the Constitution of the United States in mid-1971, and by oncoming social changes.

The relevant earlier statutes in nearly all the states set the age of majority at 21, at least for males; and most laws and court orders providing for payments of child support money for dependent children by a divorced parent carried an expressed expectation that such payments would normally continue until the child reached the age of majority. The tendency to include college expenses as part of the parental obligation fitted into this concept in large part, although ordinarily completion of a four-year college course whould not be accomplished until age 22. But few young persons enter college before age 18; and in states which have reduced the age of majority to that point the question arises as to whether college expenses will no longer be part of the obligation of the divorced parent except perhaps in rare and exceptional instances.

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1. A 25-page supplement, carrying the story up to 1973, formed a part of the eighth volume, *Faculty and Staff Before the Bench*; and has also been inserted into the second printing of the seventh volume, *The Developing Law of the Student and the College*.

California reduced the age of majority from 21 to 18 in 1972; and before the end of 1974 there had been three court decisions on the point. A husband and wife were divorced in 1955, under a decree ordering the husband to pay $125 per month for the support of the son "until such time as the child shall attain his majority." In 1973, when the boy was 18 and ready for college, the court granted a modification of the order, which required the father to pay for "all reasonable expenses, such as room, board, books, tuition and clothing of the son John at Pacific Lutheran College." The California Court of Appeal reversed that part of the order, on the reasoning that "Since the 1972 legislation, a family law court is without power to enter an order that compels a parent to support a normal child after that child has reached the new age of majority."[2]

Since the order in this case *increased* the father's obligation, it fell under the limitation. It was also held, also in accord with the earlier decision relied upon, that a court could *continue* or *decrease* a pre-1972 order, but could not *increase* the amount of the obligation.[3]

In another supporting decision, where the language of the pre-1972 decree was "to continue until emancipation" it was held that the child support order was terminated, by its own terms (*i.e.*, by the word "emancipation," which was accomplished by the statute of 1972).[4]

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2. *Lungstrom* v. *Lungstrom*, (Cal. App.), 115 Cal. Rptr. 825 (1974).

3. *Atwell* v. *Atwell*, 39 Cal. App. 3d 383, 114 Cal. Rptr. 324 (1974).

4. *Phillips* v. *Phillips*, 39 Cal. App. 3d 723, 114 Cal. App. 3d 723, 114 Cal. Rptr. 362 (1974).

A Minnesota decision of 1974 illustrates that where the husband and wife have entered into a preseparation agreement that the husband will pay college expenses of the children even if it extends beyond the age of majority, and the court adopts this agreement and makes it a part of the decree of divorce, then the agreement is enforceable regardless of the fact that the court, under the statutes of the state, has no jurisdiction to order payment of college expenses other than up to the age of majority.[5]

A New York decision of 1973 involved a wealthy divorced parent who had an annual income of over $60,000, and a net worth of more than $2 million. He had made a trust agreement to provide for the education of the four minor children. At the time of the suit the oldest child, Martha, had graduated from a private secondary school and been accepted for admission to the University of Rochester. The father had consented to her college education and provided her with funds to make application. The Family Court ordered that "he be required to provide a college education for the child, Martha, since circumstances here warrant it and it would be in her best interests and he has the financial ability to provide it."

As to the other children, all of whom were in private schools, the father must pay for their education with the proviso that if he believes the private schools are too expensive for his financial condition he may apply to the court for a change in that respect. Apparently the future college education of these children was left for later consideration when each would reach the appropriate age and academic standing. The general principle is that all support

5. *LaBelle* v. *LaBelle*, (Minn.), 223 N.W. 2d 400 (1974).

orders must be "commensurate with the needs and requirements of the minor children, on the one hand, and the ability of the husband to meet them, on the other."[6]

2. ADMISSION AS A STUDENT

The *cause célèbre* of the 1970's is *DeFunis* v. *Odegaard*, in which a white applicant to the Law School of the University of Washington who had high marks on the admissions tests and an excellent prior scholastic record was denied admission because of the policy of admitting 30 blacks and members of other minority races who had lesser scores and lower academic records. The plaintiff and his lawyers called this "reverse discrimination" and claimed it deprived him of his constitutional right to equal protection of the law.

The local trial court simply ordered him admitted as a supernumerary (above the normal quota of 150 first-year students). The University appealed to the higher state courts and thence to the U. S. Supreme Court. The state supreme court of Washington sustained the policy of the University. Before the case came to decision in the U. S. Supreme Court the plaintiff had completed his three-year law course in the Law School and was about to receive his degree. In this circumstance the Supreme Court declared the case moot and declined to decide the issue. This was over the vehement dissent of a minority including Justice William O. Douglas, who said the majority opinion was a disservice to the nation, because the issue would have to be decided.[7]

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6. *Hahn* v. *Hahn*, (Monroe County Family Court), 358 N.Y.S. 2d 236 (1973).

7. *DeFunis* v. *Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L. Ed. 2d 164 (1974).

The state supreme court, receiving the case on remand, decided that the matter was of great public interest, and reaffirmed and reinstated its prior holding that the Law School could, in consonance with constitutional equal protection principles, consider racial or ethnic backgrounds of applicants as one factor in the selection process.[8]

Other cases resembling *DeFunis* are at various stages in federal courts, and it seems indeed probable that the issue of "reverse discrimination" will again reach the U. S. Supreme Court. In one instance a white female applicant to the University of Arkansas School of Law sued in the U. S. District Court, but her complaint was dismissed because in the opinion of the court she had not proved that she had been injured by rejection of her application; and in fact she would not have been admitted even if the minority admission policy had not been in effect. (A "prediction index" computed by multiplying the undergraduate grade point average by 200 and adding the admission test score had placed her in a category of relatively low-ranking applicants who were then given special consideration in an interview with a small Law School committee. A few of these were admitted because at least one member of the committee voted favorably; but she and a majority of others in that category were not admitted because none got any favorable vote on their respective committees.)

The Eighth Circuit U. S. Court of Appeals affirmed the dismissal on the ground no injury had been shown in the application of the minority admissions policy in this case.[9]

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8. *DeFunis* v. *Odegaard*, (Wash.), 529 P. 2d 438 (1974).

9. *Henson* v. *University of Arkansas*, (U.S.C.A., Ark.), 519 F. 2d 576 (1975).

In New York, a 1974 case on similar issues, involving admission to the Downstate Medical Center of the State University of New York was decided against the complaining applicant because the acceptance of students of minority races was not based on *race alone*, but depended in part on other considerations such as judgments of their probable success in the school and in the medical profession.[10]

3. DISCRIMINATION ON GROUNDS OF RACE OR SEX

As narrated in *The Developing Law of the Student and the College*, the right of qualified persons of races other than white to be admitted to state institutions of higher education without discrimination has been settled by scores of federal court decisions. In some of the more recent decisions there is a broader mandate--they establish that each state having a dual racially segregated system of universities and colleges has an *affirmative obligation* to dismantle such a system and move toward development of a statewide system in which each institution will be open and hospitable to applicants of all races, and eventually will enroll students of different races approximately in proportion to the distribution of the races among its total population.

Cases concerning discrimination on the ground of sex are accumulating in the lower courts, and will find their way upward. Some of them relate not to admissions but to other aspects of institutional operation. For example, twelve female graduates of the University of Chicago Law School complained that the Law School Placement Service, which provided facilities

10. *Alevy* v. *Downstate Medical Center*, 350 N.Y.S. 2d 426 (1974).

for prospective employers of graduates to interview students, tolerated employers who were known to discriminate against women, in violation of the Civil Rights Act of 1964. The federal District Court conceded that the Placement Service was an employment agency within the meaning of the Civil Rights Act, but held that the law school was not required to make a determination as to whether particular firms engaged in discrimination, or to prohibit those firms from interviewing; but performed its duty once it legally referred all prospective employees, including women, to the firms for employment.[11]

An apparently new type of racial discrimination suit was brought in Louisiana against Southern University, a predominantly black state institution. A man who had been graduated from the Southern University Law School, and had subsequently failed the state bar examination three times, sought damages of $1 million. He alleged that his failure was caused by the inferior education which was "deliberately and intentionally offered at Southern University to deprive himself, and other students there, of an education equal to that offered by other state universities"; and that all the officers whom he joined as defendants, including the governor of the state, knew or should have known that this education was faulty and inadequate and would place the students at a disadvantage.

The plea was dismissed by the trial court and the dismissal affirmed by the Louisiana Court of Appeal on two grounds: The state board of education, as governing board of Southern University, was the only corporate body capable of being sued; this

11. *Kaplowitz* v. *University of Chicago*, (U.S.D.C., Ill.), 387 F.Supp. 42 (1974).

board was an agency of the state, and the legislature had never enacted any statute permitting the state itself or this agency to be sued: hence the defense of sovereign immunity prevailed. Moreover, since the suit was not based on any allegation of violation of any contract by any of the defendants, it could only be regarded as a tort action, to which the sovereign immunity defense applies.[12]

It will be recalled that when an unsuccessful student at Columbia University claimed damages because the university "does not teach Wisdom as it claims to do" he met defeat, and the U. S. Supreme Court declined to review the case.[13]

4. EXCLUSION FOR ACADEMIC REASONS

Almost always and everywhere courts have held that the authority of faculties and governing boards is absolute in matters of appraising the academic work of students, assigning grades and awarding degrees and diplomas. To be heard in court the aggrieved student must allege that the faculty decisions which he protests were made maliciously, arbitrarily, capriciously or in bad faith; and to obtain any relief such an allegation must be proved. Courts will not substitute their judgments for that of teachers in these matters. Generally it is held that the student has no right to appear in person before a hearing body before faculty decisions are made re-

12. *Huckabay* v. *Netterville*, (La. App.), 63 So. 2d 113 (1972).

13. *Trustees of Columbia University* v. *Jacobsen*, 31 N. J. 221, 156 A. 2d 251 (1959). Certiorari denied, 363 U.S. 808, 80 S. Ct. 1243, 4 L.Ed. 2d 1150 (1960). Discussed at pages 15-16 in *The Colleges and the Courts Since 1950*, by M. M. Chambers.

garding his academic deficiencies. However, in one recent case (sketched at the conclusion of this section) the Eighth Circuit U. S. Court of Appeals has held that in a particular set of circumstances a medical student expelled for "lack of intellectual ability" is entitled to an administrative hearing. Will the "due process" now so strenuously required by federal courts in college *disciplinary cases* eventually be extended to *academic deficiency* cases?

When a black graduate student at George Peabody College for Teachers alleged that the college had refused to allow him to complete his candidacy as a Ph.D. student as a result of racial bias, the U. S. District Court at Nashville dismissed the suit for total lack of evidence to support the charge. Only one member of the oral examination committee was accused of bias, and it appeared that even if he had not been on the committee the result of the committee's voting would have been essentially the same.[14]

At the Queensborough Community College of the City University of New York certain students in nursing asked for an injunction to prevent the college from changing the grading average required as a minimum prerequisite for subsequent course enrollment from D- to C-, which would result in excluding them from certain sequential courses. Apparently the college catalog contained statements assuring enrolled students that they would not be placed at a disadvantage by changes in the "curriculum"; but the Appellate Division held that the change in grade requirements was not a change in the curriculum, although two of the five judges dissented from this conclusion, and the 3 to 2 vote produced a reversal of the judg-

14. *Wells* v. *George Peabody College for Teachers*, (U.S.D.C., Tenn.), 377 F. Supp. 1108 (1973).

ment of the single-judge trial court below, where a preliminary injunction had been granted.[15]

The University of Texas at Austin adjudged a doctoral aspirant to have failed in his qualifying examination and discontinued him from further doctoral studies. He alleged in the U. S. District Court that the faculty committee's decisions in his case were primarily due to faculty dissatisfaction with his activities in promoting and selling for profit an exercise apparatus called the "Exer-Genie"; that the members of the committee were prejudiced against him as he sat for his oral examination, and that their decision was in bad faith, arbitrary, and capricious. He had been allowed to speak for himself before an appeals committee, and had made unsuccessful appeals to the president of the university and thence to the vice chancellor for academic affairs of the University of Texas System.

The plaintiff's studies were in the Department of Physical and Health Education. He held a M.Ed. in Physical Education from the University of North Carolina (1951), had taken various summer courses in physical education, and had been employed two years as a teaching assistant in physical education (1965-67). His proposed dissertation project was "Comparison of Isometric-Isotonic Exercise in the Development of Cardio-Vascular Efficiency, Muscular Strength and Endurance, Flexibility and Muscular Hypertrophy." From the record it appears possible that some members of the faculty tended to be suspicious that his research might be heavily entangled with his commercial activities in advertising the "Exer-Genie," and might be less than scientific--a matter seemingly very difficult to assess. The court concluded from the evidence

15. *Atkinson* v. *Traetta*, (N.Y.App.Div.), 359 N.Y.S. 2d 120 (1974).

before it that the university's decisions had been made on legitimate academic bases, and that he had utterly failed to prove his allegations of malice or bad faith; and rendered judgment for the university and the university officers and faculty members involved.[16]

The rare case wherein a complaining student was held to have a right to appear in person before a hearing body (due process) prior to being expelled for academic deficiencies involved the University of Iowa College of Medicine. In accord with the university's rules, the expulsion was decided upon by committees of faculty members and administrative officers without allowing the student to be present at any of the meetings. He was merely notified by letter of the conclusions. Moreover, the Dean of the College of Medicine had informed the headquarters of the Association of American Medical Colleges of the expulsion in a letter in which he wrote that the cause was apparent lack of intellectual ability and failure to do the required work. This could have scarcely served any purpose other than to make it difficult or impossible for the student to enter any other medical college in the United States.

Relying on the judgment of Justice Potter Stewart in the 1972 decision of the U. S. Supreme Court in the *Roth* case in 1972, in which, although the nontenured professor who was dropped at the end of his one-year contract was held not entitled to a statement of reasons and an administrative hearing where the university had made no charges against him and communicated nothing derogatory about him, it was said that if these facts had been different, the decision would

16. *Stevenson* v. *Board of Regents of the University of Texas*, (U.S.D.C. Tex.), 393 F Supp. 812 (1975).

have been different,[17] the U. S. Court of Appeals here decided that the plaintiff medical student, Greenhill, was entitled to an administrative hearing prior to his expulsion because derogatory statements about his intellectual ability had been communicated to the Association of American Medical Colleges, whence they would be available nationwide to other medical colleges.

In his order directing the District Court to order the University of Iowa to give Greenhill an administrative hearing, Circuit Judge Webster concluded: "The purpose of the hearing, as set forth in an appropriate notice, shall be to provide Greenhill with an opportunity to clear his name by attempting to rebut the stigmatizing material made available to other schools."

Confining his judgment to the point just stated, Judge Webster appended a footnote saying his decision did not touch the question of the rightness or wrongness of the medical faculty's evaluation of Greenhill's work as a student. He cautioned that for a court to overturn a student's dismissal for academic failure it must find that the dismissal was arbitrary and capricious; not supportable on any rational basis; or willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case. Said he: "Educational institutions can judge a student's performance better than can a court of law, particularly in an advanced field such as the study of medicine."[18] Thus he intended no sweeping upset of precedents.

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17. *Board of Regents of Wisconsin State Colleges* v. *David F. Roth*, (U.S.S.Ct. No. 71-162), 40 U. S. Law Week 5079 (June 29, 1972). Discussed at pages 53-67 and 71-73 in *The Colleges and the Courts: Faculty and Staff Before the Bench.*

18. *Greenhill* v. *Bailey*, (U.S.C.A., Ia.), 519 F. 2d 5 (1975).

5. MANDATORY ACTIVITY FEES CHARGED TO STUDENTS

Most of the action concerning student *tuition fees* during the early 1970's dealt with *differential fees for out-of-state students* in public institutions. That subject is reserved for the next section (Section 6). This present updating supplement to Chapter 5 is limited to mandatory *activity fees* customarily charged to support a multiplicity of student organizations and agencies of the Student Government.

At the University of North Carolina at Chapel Hill an old and famous student newspaper, the *Daily Tar Heel*, is edited and published by students as a student activity, receiving allocations of funds from the Student Government, which come from the pool of student activity funds officially charged and collected by the University from each student.

Recently a small group of students refused to pay the part of the mandatory activities fee attributable to the *Tar Heel*, and challenged in U. S. District Court the right of the University to charge it, alleging that they did not wish to support the paper because it often espoused and presented many social, religious, and political views contrary to their own, and that their right to freedom of speech under the First Amendment and to equal protection of the law under the Fourteenth Amendment was thus violated.

U. S. Chief District Judge Gordon denied relief on all points pleaded, in a long, detailed, and well-reasoned opinion. He pointed out that the state university student newspaper is in part an agency of the university and of the state (and thus under the protections and the prohibitions of the First and Fourteenth Amendments); that "the state is not necessasarily the unrestrained master of what it creates and

fosters."[19] He indicated that a newspaper in a free society advocates some opinions and rejects others, but this does not force any opinion upon any person who supports the paper, or impair any of his constitutional rights: "A state government or any of its agencies is not constitutionally prohibited from expressing views and promoting positions on controversial subjects"; nor from creating and supporting forums for diverse views.

He said: "The resulting stimulation to students and discussion is at the core of the educational process"; and "There is really no difference when the student moves inside the classroom. Teachers present differing views on pertinent subjects. . . That a teacher may present one viewpoint as more meritorious than another surely does not deny to students in that classroom their constitutional rights."[20]

The same result had been reached a year earlier in a decision of 1973 by U. S. District Judge Warren Urbom in Nebraska, where the facts and the issues were practically identical. It was held that use of mandatory student activity fees to subsidize a student newspaper, a student association, and a guest-speaker program did not violate the constitutional rights of students who disagreed with opinions expressed in those activities.[21]

Six and a half decades ago compulsory student activity fees were not everywhere permissible. The

19. From *Antonelli* v. *Hammond*, (U.S.D.C., Mass), 308 F.Supp. 1329 (1970). Discussed at page 199 in *The Developing Law of the Student and the College*.

20. *Arrington* v. *Taylor*, (U.S.D.C., N.C.), 380 F.Supp. 1348 (1974).

21. *Veed* v. *Schwartzkopf*, (U.S.D.C., Nebr.), 353 F.Supp. 149 (1973); affirmed without opinion in (U.S. C.A., Nebr.), 478 F. 2d 1407 (1973).

Oklahoma supreme court held that Oklahoma A & M College could not lawfully charge fees to all students for the student Christian Associations, the student newspaper, and the student athletic associations; but only from those who voluntarily participated in these activities. Such fees could not be made a condition of admission in those long-ago days of populism.[22]

6. DIFFERENTIAL TUITION FEES CHARGED TO OUT-OF-STATE STUDENTS

By long custom state universities and colleges charge much higher tuition fees to students who can not convince them that they are *bona fide* residents of the state, than those charged to "in-state" students. There was once an ancient presumption, prevailing almost universally, that any person leaving his home in one state to attend college in another must intend to return to the original state upon completion of his studies.

Although the whole picture of modern-day student migration among the states shows that in many instances in-migration approximately balances out-migration, this is not everywhere the case; and there has been increasing unease and reluctance on the part of state legislators to countenance low-fee or tuition-free education for residents of other states, unless under some inter-state agreement whereby reciprocity is achieved, and marginal amounts of money involved in a state receiving more students than it sends out are paid at intervals by the sending state. Such an agreement, of recent creation, exists among the states of Wisconsin, Minnesota, and North Dakota.

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22. *Connell* v. *Gray*, 33 Okla. 591, 127 Pac. 417, 42 L.R.A. (N.S.) 336 (1912). Discussed at pages 9-10 in Elliott and Chambers, *The Colleges and the Courts* (1936).

Some of the principal or important educational institutions in each of these states are located along the borders, and draw students from the neighboring state.

The big event in this sphere is the mid-1973 decision of the U. S. Supreme Court in *Vlandis* v *Kline*, in which a Connecticut statute directed at the several campuses composing the University of Connecticut was so drawn as to make it impossible for a student who was an out-of-state resident at the time of his first registration as a student, ever thereafter to be reclassified as a resident of Connecticut as long as his attendance continued. The Supreme Court, by a divided vote, declared this statute unconstitutional and invalid; holding that the "irrebuttable presumption" of nonresidence, not allowing the continuing student any opportunity to declare his intent or offer any evidence tending to show that he should be reclassified, was a deprivation of due process and equal protection of the law.[23]

In fact the unreasonable rule imposed on its state university by the Connecticut legislature had been practiced by many universities in many states for some years, and had recently been challenged more and more frequently in many places. Even the Connecticut legislature had abolished it in 1971, but the enactment had been vetoed by the governor. The Supreme Court gave the rule its death blow, although by an amazing diversity of opinions. The majority opinion was written by Justice Potter Stewart. Three of the Justices wrote or joined in special concurrences--White, Marshall, Brennan; and three wrote or joined in dissenting opinions--Chief Justice Burger, and Rehnquist and Douglas.

23. *Vlandis* v. *Kline*, 93 S.Ct. 2230 (June 11, 1973); affirming 346 F.Supp. 526, the judgment of Chief Judge Blumenfeld of the U. S. District Court.

The two plaintiffs were women: one was from California but had married a resident of Connecticut and they had purchased a house and established a permanent residence at Storrs, near the main campus of the university. The other was an unmarried graduate student, originally from Ohio, but had moved to Connecticut in 1971 and registered as a full-time student at the university. Both women had Connecticut drivers' licenses, owned cars registered in Connecticut, and were registered voters in Connecticut. An irrebuttable presumption of nonresidence would be unconscionable, the high tribunal said.

Slightly earlier cases in lower federal courts had sustained the right of the states to prescribe a period of residence (usually one year) prior to being heard for classification as a resident student for tuition fee purposes.[24] This continues to be the law.

7. ASPECTS OF STUDENT FINANCIAL AIDS

In 1975 a special three-judge U. S. District Court sustained the rule of the Pennsylvania Higher Education Assistance Agency that former felons must affirmatively prove that they were of satisfactory character in order to receive student aid from the state.[25] It will be remembered that in 1973 a U. S. District Court in Illinois held unconstitutional an Act of Congress intended to prohibit federal student

24. *Starns* v. *Malkerson*, (U.S.D.C.,Minn.), 326 F.Supp. 234 (1970); summarily affirmed in 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed. 2d 527 (1971). Discussed at page 64 in *The Developing Law of the Student and the College.*

25. *Carbonaro* v. *Reeher*, (U.S.D.C., Pa.), 392 F.Supp. 753 (1975).

aid to students convicted of a "crime of serious nature" because of vagueness and lack of precision. Perhaps "felon" is more explicit; and perhaps the two District Courts are divergent on the question of how far persons formerly convicted can or should be deprived of rights and privileges in the future.

The U. S. Supreme Court, by vote of 8 to 1, with Justice Douglas dissenting, sustained the part of the Veterans' Readjustment Act of 1966 which limited educational benefits to veterans who had served on active military duty, and denied them to conscientious objectors who had refused such service, but had satisfactorily performed two years of alternative civilian service.[26] The eight Justices in the majority decided that this was no violation of First Amendment freedom of religion, nor of Fifth Amendment due process of law. On this latter point, the Court reversed the U. S. District Court in Massachusetts.

Justice William O. Douglas, dissenting, thought the denial of educational benefits to such conscientious objectors, while granting them to all other draftees, placed an unconstitutional penalty on the assertion of religious scruples.

Bob Jones University, the private fundamentalist religious institution at Greenville, South Carolina, had in 1971 some 221 student veterans of the armed services, and these students were receiving about $400,000 in educational benefits from the U. S. Veterans' Administration. Bob Jones University denies admission to unmarried nonwhite students, and expels students who date persons of any other race than their own. Because of this discrimination the U. S. Administrator of Veterans' Affairs made a final

26. *Johnson* v. *Robison*, (U.S.S.Ct.), 39 L.Ed. 2d 389 (1974).

order terminating all educational benefits to students at Bob Jones late in 1972, after investigating and determining that the racial discrimination was in violation of Title VI of the Civil Rights Act of 1964.

Contested in U. S. District Court, the order was upheld by District Judge Robert W. Hemphill in mid-1974. The opinion holds, in lengthy reasoning, that VA educational benefits to its students actually make the institution itself a beneficiary of federal financial aid, and hence within the prohibition of racial discrimination, and subject to the penalty of withdrawal of such aid.[27]

The U. S. Court of Appeals in the Ninth Circuit held in 1975 that a student who attended two California state colleges in 1965 and 1966 and obtained National Defense Education Act loans for that purpose aggregating more than $5,000, and in 1967 applied for and obtained a loan of $9,000 from the University of California at Berkeley without listing his prior loans on his application (and having proceeded to obtain discharge of those loans in bankruptcy proceedings) was not entitled to a second discharge in bankruptcy of his loan of $9,000 from the University when he again filed a petition in bankruptcy in 1972. Failure to disclose prior loans on a loan application is fraud.[28]

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27. *Bob Jones University* v. *Johnson*, (U.S.D.C., S.C.), 396 F.Supp. 597 (1974).

28. *Regents of the University of California* v. *Abbot*, (U.S.C.A., Cal.), 516 F. 2d 830 (1975).

8. VARIOUS FACETS OF STUDENT LIFE

After the adoption of the Twenty-sixth Amendment in mid-1971 it frequently happened that local election registrars in subdivisions where colleges were located dragged their feet and attempted to continue the former practices epitomized in an early 1971 opinion of the California attorney general: "For voting purposes the residence of an unmarried minor will normally be his parents' home."

This was emphatically negated by the California supreme court August 28, 1971, in a rather florid opinion by Justice Raymond E. Peters, whose words preserve some of the flavor of that period:

"America's youth entreated, pleaded for, demanded a voice in the governance of this nation. On campuses by the hundreds, at Lincoln's monument by the hundreds of thousands, they voiced their frustration at their electoral impotence and their love of a country which they believed to be abandoning its ideals. Many more worked quietly and effectively within a system that gave them scant recognition. And in the land of Vietnam they lie as proof that death accords youth no protected status. Their struggle for recognition divided a nation against itself. Congress and more than three-fourths of the states have now determined in their wisdom that youth 'shall have a new birth of freedom'--the franchise. Rights won at the cost of so much individual and societal suffering may not and shall not be curtailed on the basis of hoary fictions that these men and women are children tied to residential apron strings. Respondent's refusal to treat petitioners as adults for voting purposes violates the letter and spirit of the Twenty-sixth Amendment."[29]

29. *Jolicoeur* v. *Mihaily*, (California supreme court), 40 *U.S. Law Week* 2142 (August 28, 1971).

Other facets of student life appear in the several sections which follow.

9. COLLEGE DORMITORY RESIDENTS

Twice the U. S. Supreme Court has affirmed lower federal court judgments[30] holding no constitutional rights of students are violated by reasonable rules requiring specified classes of students to reside and obtain their meals in college-owned residence and dining halls. Under this plan untold millions of students have had housing and food service approximately at cost, over a period of more than fifty years since the state universities began in earnest the financing and construction of "self-liquidating dormitories" during the 1920's. The practice is nationwide and deserves to be rated as a huge success as a large factor in the expansion of higher education in the United States.

The general principle is so obviously sound that it was not shaken by a recent rash of suits in federal courts in several states by students who pleaded that the pertinent university rules were in contravention of their constitutional rights. A few of the decisions went temporarily astray on such arguments as that the university had no motive other than the pecuniary aspect, which was alleged to be reprehensible; that the educational values involved were specious; or that "equal protection" was violated by requiring some students to pay dormitory and dining hall charges while

30. *Pyeatte* v. *University of Oklahoma*, 342 U.S. 936, 72 S. Ct. 567, 96 L.Ed. 696 (1952), affirming (U.S.D.C., Okla.), 102 F.Supp. 407 (1952); and *Pratz* v. *Louisiana Polytechnic Institute*, summary affirmance by the U. S. Supreme Court April 6, 1971, of U.S.D.C., La., 316 F. Supp. 872 (1970).

others were allowed to be housed and fed elsewhere. Soon these contentions met defeat by reversal in higher courts. These cases are too numerous to be recited here. A few are cited.[31]

A different issue arose at the State University of New York at Stony Brook; namely, could the University exclude married students with children from its living quarters prepared for married students without children, if there was a rational basis for the distinction? Several married couples with children sued in U. S. District Court for a permanent injunction against the banning of children from the suites, and won their case; but this was reversed by the Second Circuit U. S. Court of Appeals.

The main issue was that of equal protection of the law under the Fourteenth Amendment. The U. S. Court of Appeals quoted from one of the opinions of former Chief Justice Earl Warren: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Among the good reasons for the distinction here were: the University currently had no quarters planned and prepared for families with children; the suites in dispute were inadequate as family living units, because they had no kitchens (hot-plate cooking was permitted, but there had been 53 fires in a period of 18 months); there was heavy street traffic and no traffic lights, making hazardous conditions for chil-

31. *Prostrollo* v. *University of South Dakota*, (U.S.C.A.,S.D.), 507 F. 2d 775 (1974), reversing (U.S. D.C.,S.D.), 369 F. Supp. 778 (1974); *Short* v. *Board of Governors of State Colleges and Universities of Illinois*, U.S.D.C., Eastern District of Illinois, No. CV 73-97-D (1975).

dren. The U. S. Court of Appeals concluded: "With a campus which has parking problems, no traffic lights and heavy construction in progress (one student fell to his death through an uncovered manhole), it is rational for the University, which will be legally responsible for its negligence, to postpone the residence of children until such time, if ever, that it can provide the housing it (and not the parents) deems adequate." Under existing conditions, the willingness of parents to "make do" was not pertinent.[32]

10. UNREASONABLE SEARCHES AND SEIZURES

The upshot of the prior litigation seems to indicate that a student's dormitory room "is his castle" into which no national, state, or local police officer should seek entry without a valid and specific search warrant; but appropriate officers or employees of the college or university may seek entry without a warrant if connected with safety or sanitation and even if for disciplinary reasons on the part of the institution; and indeed, the rental contracts signed by the students often provide for these contingencies.

The U. S. District Court for the Western District of Michigan has introduced a deviation from that apparent consensus. In a case where three college housing supervisors and two deputy county sheriffs (one of whom was also a campus police officer) entered a student's room at Grand Valley State College and found marijuana, the District Court holds that even the college officers have no right to enter the room without a search warrant, even when there is reasonable cause to believe the student is violating a college regulation.

32. *Bynes* v. *Toll*, (U.S.C.A., N.Y.), 512 F. 2d 252 (1975).

The court's reasoning is that the Fourth Amendment protection against unreasonable searches and seizures is not limited to criminal prosecutions but applies to all alike whether or not accused of crime. Thus it would be immaterial to ask whether any subsequent proceedings were to involve criminal charges or merely a college disciplinary infraction.[33]

At the University of California at Los Angeles, dormitory authorities forbade door-to-door canvassing of dormitory rooms by deputy county registrars of voters, but permitted the registrars to set up tables in the lobbies of dormitories and solicit registrations there. A California Court of Appeal upheld this rule as in compliance with federal and state laws.[34]

11. CONFIDENTIALITY OF STUDENT RECORDS

"The Family Educational Rights and Privacy Act of 1974," otherwise known as the Buckley Amendment (Public Laws 93-380, section 513) became Section 438 of the General Education Provisions Act, and is identified as 20 *U.S. Code* 1232-g. It was elaborated somewhat by Senate Joint Resolution 40, passed by Congress December 19, 1974. On January 6, 1975 the Department of Health, Education, and Welfare's proposed rules for the implementation of this legislation was first printed in the *Federal Register*. This was a preliminary printing to be followed by a period of 60 days for the receipt of comments, objections, and suggestions from interested persons. By the Fall of 1975 final regulations had not yet been published.

33. *Smyth and Smith* v. *Lubbers*, (U.S.D.C., W.D. Mich., G 74-46 CA, 1975).

34. *Natl M for S V* v. *University of California*, (Cal.App.), 123 Cal. Rptr. 141 (1975).

During Senate floor debate in the Spring of 1974 the purpose of his amendment had been briefly stated by Senator James Buckley of New York: (1) to insure that parents have the right of access to their children's school records, (2) to prevent the abuse and improper disclosure of records and personal data on students and their products, and (3) to require parental consent before such records are disclosed to most third parties (120 *Congressional Record* S8064, May 14, 1974).

Section 438-d provides that "*whenever a student has attained eighteen years of age*, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student *shall thereafter only be required of and accorded to the student.*" Hence the application to college and university students.

As of mid-1976 it appears that no important litigation under this legislation has reached decision in the courts. Consequently it has only limited place in this present discourse. Apparently it will have important effects in reducing unnecessary and undesirable secrecy in transactions between educational institutions and their students concerning student personnel files.

The *Federal Register* dated March 2, 1976 (Vol. 41, p. 9062ff.) carried "Initial Implementation Regulations," as released by the Department of Health, Education and Welfare, for the Buckley Amendment. Further rules will probably be forthcoming as the application of the law in the field proceeds.

An example of a university practice which may be affected is that of posting of student grades in common areas (lobbies or corridors) of campus buildings.

Although the names of the students are usually not posted, their respective "student numbers" being posted instead, there is a widespread feeling that it is generally too easy for unauthorized persons to find out the names connected with the numbers, for this practice to provide adequate protection of the students' privacy.[35]

The basic principle is that students' grades are not included in the statutory definition of "directory information" which may be freely published or otherwise made available regarding any student. Instead, students' grades appear to be in the category of records that can properly be disclosed only with the written, signed, and dated consent of the student concerned. This conforms with the general practice of releasing transcripts of credits (which carry grades) only upon the written request of the student.

Illustrating the inevitable clash between some university practices and the applicable federal law and regulations is the opinion of one university attorney that, if there is no university rule requiring the posting of grades, then such posting is a part of the individual instructor's mode of teaching, in which no government can intervene without infringing upon academic freedom.

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35. Current information concerning the application of this and other features of the Act appears at intervals in a series of *Special Reports* circulated by the National Association of College and University Attorneys, Suite 510, One Dupont Circle, Washington, D. C. 20036.

12. TORTS AGAINST STUDENTS

At Southern University in Baton Rouge, a student on her way to a class on the second floor of W. W. Stewart Hall, noticed that the floor was slippery but decided to traverse it anyway since she was within some twenty feet from the classroom door. She fell and was injured; sued the university for negligence and was awarded $2,750 damages. This was affirmed by the Louisiana Court of Appeal. The offending floor was covered with an excessive coating of banana oil. Customarily, in accord with instructions, banana oil was applied to the mops, which were then allowed to stand overnight before being used. Somehow the overnight delay had been omitted in this instance. Judge de la Houssaye stated the applicable law concisely: "The owner of property owes to invitees the duty of exercising reasonable care for their safety and is liable for injury resulting from the breach of that duty, if the breach is the proximate cause of the accident."[36]

Contributory negligence on the part of the injured person, and "assumption of the risk" as barring a favorable result were both illustrated when a girl student at the College at Purchase, of the State University of New York, severed a finger on a power saw. The injury occurred at about 8:00 p.m. in a class supervised only by a qualified student assistant. All students had been instructed repeatedly not to use the power saw, but to have the supervisor present use it for them when necessary. The injured girl nevertheless was operating the machine alone, when nothing prevented having the supervisor use it for her. One definition of contributory negligence is "conduct on

36. *Lumbard* v. *Fireman's Fund Insurance Company*, (La.App.), 302 So. 2d 394 (1974).

the part of the claimant which falls below the standard to which she should conform for her own protection." She was neither required nor authorized to use the power saw; and Judge Albert A. Blinder concluded "A reasonable, prudent person would not have used the saw without more familiarity with its operation." Handsaws were available in the room, and she had been instructed in their use two weeks before the accident. She did not have to use the power saw, and "must have realized the possibility of injury when she turned the machine on." This was "assumption of risk."[37]

At Glassboro State College in New Jersey a student attended a basketball game in the college gymnasium. There was tension and danger of rioting between whites and blacks. At half-time, disturbed by the atmosphere of tension and by rumors he had heard, the student left the gymnasium to return to his dormitory. He was accosted and followed by three blacks, and an altercation ensued in which he was stabbed in the abdomen. When he sued the college, alleging insufficient police protection, the court decided that his claim was barred by the New Jersey Tort Claims Act, which makes a public entity not liable for failure to provide police protection[38] and not liable for failure to provide supervision of public recreational facilities,[39] except as to defective or dangerous conditions of the physical property.

The superior court (trial court) decided the college was under no statutory obligation to protect invitees from the propensity of third persons to attack

37. *Segal* v. *State of New York and the State University of New York College at Purchase*, (N.Y. Ct.of Claims), 359 N.Y.S. 2d 498 (1974).
38. *New Jersey Statutes Annotated*, 59: 5-4.
39. *New Jersey Statutes Annotated*, 59: 2-7.

and injure them; and this was affirmed by the three-judge Appellate Division, in an opinion written by Judge Bischoff, with a specially concurring opinion by Judge Botter in which he thought the college could not be liable as an insurer aginst all crime on its campus.[40]

Suits in tort against state or other public institutions are sometimes defeated by "sovereign immunity of the state and its agencies" which continues to prevail in some states. This doctrine has usually been adhered to in Texas, but the state now has a Tort Claims Act which provides that "Each unit of government shall be liable for money damages for personal injuries (negligently) caused from some condition or some use of tangible property. . . " A student who injured his knee while playing football for Texas Tech University sought to hold the University liable for failure to encase his formerly injured but recovered knee in adhesive tape prior to the game in which he was injured. The decision was that this circumstance was not within the meaning of the statute quoted, and a judgment to that effect was affirmed by the Court of Civil Appeals.[41]

At Louisiana State University a student who was injured while engaging in spring practice of the Varsity baseball team was denied any remedy against the University. Judge Landry of the three-judge Louisiana Court of Appeal wrote: "It is settled law that one who participates in a game or sport *assumes the risk* (emphasis added) of injuries which are inherent in or incidental to that game or sport." The injured

40. *Setrin* v. *Glassboro State College*, 136 N. J. Super. 329, 346 A.2d 102 (1975).

41. *Lowe* v. *Texas Tech University*, (Tex. Civ. App.), 530 S. W. 2d 337 (1975).

student in this case was struck in the face by a "fungo bat" which accidentally slipped from the hands of an assistant coach who was near the third base line batting fungoes, as is customary for the purpose of insuring that each fielder will get some practice. It seems that being hit by a bat that accidentally slips out of the hands of a batter is a rather common occurrence in baseball, and is regarded as a hazard of the game which participants assume.[42]

13. FREEDOM OF SPEECH AND ASSEMBLY

The Associated Students of the University of California at Riverside purchased a supply of a *Birth Control Handbook* and mailed copies to female students. The local postmaster refused them for mailing, citing postal regulations under 18 *U. S. Code* 1461 and 3001 (e), which provided that information on the procuring or producing of abortion, and any unsolicited advertisement of matter intended for preventing of conception, is unmailable. The Associated Students then asked the U. S. District Court for a writ of *mandamus* to compel the postoffice to mail the *Handbooks*. The writ was granted. The court said the use of the mails is as much a part of free speech as verbal communication, and that the decision whether to undergo or procure abortion is a fundamental right whose infringement through regulation can be justified only by the presence of a compelling state interest.

"The Government has not presented any interest which might form the justification for this restraint on free speech." Therefore the pertinent parts of the statute were held unconstitutional and invalid. The defect was that the distinction was not made be-

42. *Richmond* v. *Employers' Fire Insurance Company*, (La.App.) 298 So. 2d 118 (1974).

tween "the inherent difference between commercial solicitation on one hand and information editorialized on the other." The Associated Students were not soliciting, commercially or otherwise. They were only disseminating knowledge necessary to aid the recipients in making informed decisions.[43]

This section does not exhaust the treatment of constitutionally protected freedom of expression. It recurs frequently in the next three sections, especially section 16, "Freedom of the Student Press."

14. THE "SPEAKER BAN" FUROR

(No changes noted.)

15. STUDENT ORGANIZATIONS

"Young Americans for Freedom" is a nationwide organization with its membership chiefly among college and high school students, and its state and local units usually at educational institutions. Its purpose appears to be to advance conservative political and economic points of view. This organization attacked as unconstitutional a recent "disclosure" statute of the state of Washington, on the ground that it would require the YAF to reveal its entire membership roll, and to reveal all its receipts and expenditures without exception. The trial court ruled the statute unconstitutional; but the supreme court of Washington reversed, interpreting the statute to mean only that organizations within its purview must disclose only the persons and funds involved

43. *Associated Students of the University of California at Riverside* v. *Attorney General of the United States*, (U.S.D.C., Cal.) 368 F.Supp. 11 (1973).

in *specific campaigns*; and that they are not required to reveal members who only pay dues and are not contributors to any specific campaign. Direct and indirect lobbying activities may constitutionally be subjected to the requirements of the statute.[44]

Justices Rossellini and Hunter dissented, and would have held the statute unconstitutional.

Florida State University denied the status of "recognized student organization" to the Young Socialist Alliance. (The then chairman of the Florida Board of Regents had directed the presidents of all nine of the state universities to refuse recognition of the YSA because of its "revolutionary" nature.) In 1972 the U. S. District Court denied redress to the Young Socialist Alliance; but appeal was taken to the Fifth Circuit U. S. Court of Appeals, where the three-judge panel, by a vote of 2 to 1, pronounced the case moot and declined to decide the issue because neither of the two individual plaintiffs was a student at Flordia State University, and the conclusion was that in that circumstance, with no student pleading for recognition of the YSA, there was no justiciable controversy. The judgment below was vacated and remanded so that it would not stand as a barrier to reapplication by students.[45]

Circuit Judge Goldberg objected to this view in a long and vigorous dissenting opinion in which he noted: "Merkey--who as a former student and employee of the university is certainly no officious disinterested interloper--" had a sufficient stake in the outcome of the controversy "to ensure that 'the dispute

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44. *Young Americans for Freedom, Inc.* v. *Gorton*, (Wash.), 522 P. 2d 189 (1974).

45. *Merkey and Young Socialist Alliance* v. *Board of Regents of the State of Florida*, (U.S.C.A., Fla.), 493 F. 2d 790 (1974); vacating and remanding (U.S.D.C., Fla.) 344 F.Supp. 1296 (1972).

sought to be adjudicated will be preserved in an adversary context and in a form historically viewed as capable of judicial resolution'"; and concluded that the majority opinion made mootness "what it was most certainly never meant to be--a haven for indecision."

After the Gay Students' Organization of the University of New Hampshire held a dance on the campus (at which no indecent, repugnant or unlawful acts nor any acts in contravention of good order and discipline were alleged), the board of trustees forbade any further campus social functions by this recognized student organization "until the matter is legally resolved." The trustees had been prodded by a letter from the governor of the state saying that if they did not "take firm, fair, and positive action to rid your campuses of socially abhorrent activities" he would "stand solidly against the expenditure of one more cent of taxpayers' money for your institutions."

The GSO sued the trustees, the governor, the president and other appropriate officers of the university, alleging deprivation of their right of association resting on the First Amendment, and won a judgment in their favor by U. S. District Judge Hugh H. Bownes. His judgment was affirmed by the First Circuit U. S. Court of Appeals. Chief Circuit Judge Frank M. Coffin wrote a lengthy and thoughtful opinion for the three-judge panel, in which he said:

"The underlying question, usually not articulated, is whether, whatever may be Supreme Court precedent in the First Amendment area, group activity promoting values so far beyond the pale of the wider community's values is also beyond the boundaries of the First Amendment, at least to the extent that university facilities may not be used by the group to flaunt its credo." He then explained at length that there are so many and diverse groups and contrasting views in the whole society on many social and moral questions that "we are unable to devise a tolerable

standard exempting this case at the threshold from general First Amendment precedents."

"The Supreme Court's recent decisions. . . indicate in no uncertain terms that the First Amendment applies with full vigor on the campuses of state universities. . . Indeed, the Court has recognized that 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"

He concluded: "If a university chose to do so, it might well be able to regulate overt sexual behavior, short of criminal activity, which may offend the community's sense of propriety, so long as it acts in a fair and equitable manner. The point in this case is that the district court has found no improper conduct. . . Defendants sought to cut back GSO's social activities simply because sponsored by that group. The ban was not justified by any evidence of misconduct attributable to GSO, and it was altogether too sweeping."[46]

16. FREEDOM OF THE STUDENT PRESS

Follow first the sequels to *Papish* v. *University of Missouri* (discussed at pages 166-167 in *The Developing Law of the Student and the College*), in which the U. S. District Court upheld the expulsion of a female graduate student of journalism for distributing on the campus an underground newspaper containing profane and indecent expressions. The Eighth Circuit U.S. Court of Appeals affirmed; but the U. S. Supreme Court

46. *Gay Students' Organization of the University of New Hampshire* v. *Bonner*, (U.S.C.A.,N.H.), 509 F. 2d 652 (1974); affirming (U.S.D.C.,N.H.), 367 F.Supp. 1088.

reversed and remanded the case to the District Court, with instructions to order the University to restore to the student "any course credits she earned for the semester in question and, unless she is barred from reinstatement for valid academic reasons, to reinstate her as a student in the graduate program."

Referring to its own decision of only a few weeks earlier in *Healy* v. *James* (discussed at pages 226-227 in *Faculty and Staff Before the Bench*, in the first updating of *The Developing Law of the Student and the College*), the Court said: "We think *Healy* makes it clear that the mere dissemination of ideas--no matter how offensive to good taste--on a state university campus may not be shut off in the name alone of 'conventions of decency'"; and concluded that it was "equally clear that neither the political cartoon nor the headline story involved in this case can be labelled as constitutionally obscene or otherwise unprotected." Noting that free expression may be regulated as to the time, place, or manner of its delivery or distribution, the Court emphasized that in this case the student had been expelled solely because of the *content* of the newspaper. This is where regulation collides with First Amendment rights.[47] The *per curiam* decision was not unanimous. Chief Justice Warren E. Burger and Justices William H. Rehnquist and Harry A. Blackmun entered dissenting opinions.

Officers at the University of Mississippi became unhappy with two stories written by a black student and published in a particular issue of the student literary magazine, *Images*, and forbade distribution of that issue. Students asked the U. S. District Court to order the university officers not to interfere, and

47. *Papish* v. *Board of Curators of the University of Missouri*, 93 S.Ct. 1197 (1973); reversing 464 F. 2d 136 and 331 F.Supp. 1321 (1971).

the order was granted; and the Fifth Circuit U. S. Court of Appeals affirmed. However, the court decided that it would be permissible for the University, at its option, to place on each copy of any issue of the magazine a stamp with the words: "This is not an official publication of the University."[48] *Images* was financially supported by sales, student activity fees, and by the Department of English if necessary.

The reasoning of the Court of Appeals was in accord with other recent federal court decisions to the effect that: "once a University recognizes a student activity which has elements of free expression, it can act to censor the expression only if it acts consistent with First Amendment constitutional guarantees. . . The courts have refused to recognize as permissible any regulation infringing free speech when not shown to be necessarily related to the maintenance of order and discipline within the educational process."

When the president of Florida Atlantic University dismissed three students from their editorships of the student newspaper *Atlantic Sun* because he thought "the level of editorial competence and responsibility had deteriorated to the extent that it reflected discredit and embarrassment upon the university," the student editors sought injunctive and declaratory relief, including damages. The U. S. District Court ordered them reinstated as editors and awarded them back pay and nominal damages of $1 each from the president. The Fifth Circuit U. S. Court of Appeals affirmed, and took pains to say that ignorance of the law in such a matter would not excuse the president; that he had failed to obtain legal advice in the matter; and that an administrator in his position must be held to a

48. *Bazaar* v. *Fortune*, (U.S.C.A.,Miss.), 489 F. 2d 225 (1973), rehearing 476 F. 2d 570 (1973). Review declined by U. S. Supreme Court (1974).

standard based on "knowledge of the basic unquestioned constitutional rights" of the students.[49]

At East Carolina University at Greenville, North Carolina, drastic disciplinary action was taken against the editor-in-chief of the student newspaper and another student who wrote a letter published in that newspaper, resulting in their exclusion from the university. The letter was addressed to the president (now called chancellor since the statewide reorganization) and criticized him severely for one of his rulings about dormitories. Near the end of the letter was a one-word, four-letter vulgarity referring to the president.

In the U. S. District Court, from which the two students asked relief, District Judge John D. Larkins ordered that the students' records be expunged of the disciplinary action, and, if they were academically eligible, they be allowed to continue their education at the university. The Fourth Circuit U. S. Court of Appeals affirmed.

The court noted that "No disturbances or disorders or interference in connection with any school or school-related function occurred as a result of the printing of of the letter"; and continued: "University officials undertook to deny these college students the right to continue their education because one word in an otherwise unexceptionable letter on a matter of campus interest was deemed offensive to good taste. . . That they may not do."[50]

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49. *Schiff* v. *Williams*, (U.S.C.A., Fla.), 519 F. 2d 257 (1975).

50. *Thonen* v. *Jenkins*, (U.S.C.A.,N.C.), 491 F. 2d 722 (1973).

17. DUE PROCESS IN DISCIPLINARY PROCEEDINGS

Subjecting a student to a penalty on proved charges of "academic dishonesty" is a *disciplinary* matter, not a matter of *academic deficiency*. The distinction is important because although a growing body of weighty precedents defines and supports *due process* in the former, it has uniformly been held that penalties for academic deficiencies do not require procedural propriety, but may simply be imposed by the faculty unilaterally in the absence of allegation and proof of malice, caprice, unreasonableness, or bad faith.

Thus the dean of the Hershey Medical Center of Pennsylvania State University was in error when he summarily notified a medical student by letter that he was suspended from classes because he was accused of having "copied" in an examination in Embryology. The mistake was almost immediately rectified when the medical faculty became apprised of the regulations of the University regarding notice and hearings for students charged with serious disciplinary infractions. Meantime the student had asked the U. S. District Court for a preliminary injunction enjoining the convening of a university hearing board to consider the charges against him, without allowing him to be represented by legal counsel. The injunction was denied on the familiar ground that he had not demonstrated a reasonable probability of success in subsequent proceedings and representation by legal counsel is not a mandatory right of the accused student in such cases.[51] It appeared that the University's case at the hearing would be presented by a medical doctor who had no legal training; and there is great reluctance to encourage disciplinary hearings to be turned into contests between opposing lawyers.

51. *Garsham* v. *Pennsylvania State University*, (U.S.D.C., Pa.), 395 F. Supp. 912 (1975).

A different kind of alleged "academic dishonesty" was involved at Brigham Young University in Utah, where a student was expelled from graduate school on that ground. Since Brigham Young is a private university owned and operated by the Church of Jesus Christ of Latter-Day Saints, the student sued in U. S. District Court (as a citizen of a state other than Utah) on the archaic plea (in such cases) of breach of contract, and asked money damages for his expulsion. At the request of the University there was a jury trial, and the student was awarded some $88,000 in damages; whereupon the University appealed to the Tenth Circuit U. S. Court of Appeals, where a three-judge panel, in an opinion by Circuit Judge Oliver Seth, reversed the judgment and took a different view.

The charge against the student was in the domain of ethical conduct, not of academic deficiency. Having written two technical articles, he had had difficulty in getting them published by any journal, so he had resorted to the expedient of placing the name of one of his professors on them as joint author, without the professor's knowledge or consent. Thus the articles were published.

The central issue was, said Judge Seth, whether this was a violation of the University rules as to conduct, which required that students "observe high principles of honor, integrity, and morality, and be honest in all behavior. This includes not cheating, plagiarizing, or knowingly giving false information."

The judge inveighed against the exclusive application of the "commercial contract theory" to a university case of this kind, and pointed out that the issue was one of proper application of reasonable disciplinary rules in the context of a church-related institution. The expulsion was not summary; the student had been afforded ample due process in the form of notice and hearings; no First Amendment issues were

involved, nor any other constitutional questions. It was held that the evidence supported the charge of violation of the University rule, and the expulsion was in accord with due process. Judgment for the University was ordered.[52]

The view of a local trial court in New York State regarding due process in a private college is appropriate at this point. At Ithaca College a student was suspended pursuant to the college's disciplinary procedures, and asked the court for an order of reinstatement. Justice Paul J. Yesawich, Jr., observed that in the absence of enough involvement of the state to make the college a state instrumentality, the Fourteenth Amendment due process clause does not apply to a private college; but nevertheless it is imperative that the disciplinary procedures be fair and reasonable.

He noted that the College rules provided a hearing board and an appeal board; and that in this case all had apparently been regular except that the accused student had not been allowed to appear at the proceedings of the appeal board in his case. This, the justice found, was a violation of the College's own judicial code; and he remanded the matter to the appeal board with direction to permit the student to appear.[53]

In contrast, however, U. S. District Judge John W. Oliver of the Western District of Missouri, in the expulsion of a student by Northwest Missouri State University at Maryville, held that it was permissible for the University to deviate from its own procedural rules and hold a *de novo* hearing before the Board of Regents, so long as the proceeding comported with due process

52. *Slaughter* v. *Brigham Young University*, (U.S. C.A.,Utah), 514 F. 2d 622 (1975); reversing U.S.D.C. below.

53. *Matter of Kwiatkowski* v. *Ithaca College*, 368 N.Y.S. 2d 973 (1975).

and did not deprive the student of any of his constitutional rights. From the record the court determined that the hearing before the Board of Regents met all requirements of due process, and that the evidence supported the determination to expel the accused student.[54]

Another nail has been driven in the coffin of the nonsensical contention that university disciplinary proceedings, when the accused student is also to be brought to trial in a civil court for the same offense, must be postponed until after the court trial to avoid prejudicing his case by prematurely disclosing his defenses. In earlier cases of this type it has been argued that university disciplinary proceedings and a civil court trial of the same accused person for the same offense constitute "double jeopardy" as prohibited in the federal Bill of Rights; but in fact the federal guarantee is held to apply only to *criminal proceedings in court* and not to *quasi-judicial administrative proceedings* in a university. Moreover, it seems to be established that the record of a university disciplinary hearing will be excluded as evidence in a criminal trial, thus negating the possibility of "self-incrimination" or "double jeopardy" or premature disclosure of defenses.

The supreme court of Vermont, refusing to stay the action of the Castleton State College in disciplining (with due process) a student who would also be tried in Vermont courts for the same offense, said: "Educational institutions have both a need and a right to formulate their own standards and to enforce them; such enforcement is only coincidentally related to criminal charges and the defense against them"; and pointed out the delay in the criminal proceedings

54. *Edwards* v. *Northwest Missouri State University*, (U.S.D.C., Mo.), 397 F.Supp. 822 (1975).

might easily enable the accused student to finish his college course, "thus effectively completing an 'end run' around the disciplinary rules and procedures of the college."[55]

18. HOW SPECIFIC MUST DISCIPLINARY RULES BE?

Criminal statutes are in danger of being unconstitutional and invalid unless they specifically and precisely define the forbidden acts for which they provide penalties. It is everywhere agreed that universities also have an obligation to make their disciplinary rules specific, but that they will not be held to as high standards of specificity as state statutes. There was once a disagreement between federal judges in the Seventh and Eighth Circuits, U. S. Courts of Appeals regarding the necessary degree of precision; and the question may continue to be unsettled.[56]

Another pertinent case arose at Murray State University in western Kentucky, where in the Fall of 1971 a group of black students were disciplined for disruptive conduct, including forcible entry into an Alumni banquet and creating a disturbance; refusing to leave the banquet when requested by university officers, and resisting university police while being removed, as well as using vulgar and profane language. Seeking remedy in the U. S. District Court, they contended that the university rule under which they had been charged and found guilty was so vague and overbroad as to be invalid: "The University will not allow or tolerate any disruptive or disorderly conduct which

55. *Nzuve* v. *Castleton State College*, (Vt.), 335 A.2d 321 (1975).

56. See pages 247-256 in *The Colleges and the Courts: The Developing Law of the Student and the College* (1972).

interferes with the rights and opportunities of those who attend the University for the purpose for which the University exists--the right to utilize and enjoy the facilities provided to obtain an education."

District Judge Allen sustained that rule as sufficiently specific, in a long and thoughtful opinion citing other recent pertinent decisions from other jurisdictions.[57]

19. STATE STATUTES APPLIED TO CAMPUS DISORDERS

During the recent years of widespread student unrest many state legislatures became agitated to the point of hastily enacting harsh statutes applying exclusively to disruptive activities at schools and colleges, providing such penalties as automatic summary suspension or expulsion of students, mandatory cut-off of student aids, and authorizing university authorities summarily to order any person off a public campus. Often these new enactments were *prima facie* unconstitutional. Some were vetoed by sensible governors; others were litigated and judicially declared invalid; and some survive.

Moreover, these statutes were generally redundant. Every state has laws of long standing regarding breach of the peace, trespassing, breaking and entering, assault and battery, vagrancy, loitering, disorderly conduct, and the like which would adequately cover any type of campus misbehavior. Incidentally, in the recent litigation some of these old statutes originally designed to oppress destitute transients ("vagrancy" laws in particular) have been declared unconstitutional

57. *Lowery* v. *Adams*, (U.S.D.C.,Ky.), 344 F.Supp. 446 (1972.

as too vague and overbroad in the light of the newer requirements of specificity.

Ohio enacted a lengthy "Campus Disruption Law" which escaped being held unconstitutional on its face because under it students or faculty members were to be suspended or dismissed only after a hearing, and the named offenses were held to be explicit and not vague. This was the decision of a special three-judge U. S. District Court in Ohio, in the suit of two students--one at Ohio University at Athens and the other at Ohio State University at Columbus. The court also thought it should abstain because the issues raised could have been heard in the first instance in state courts. The judgment was summarily affirmed by the U. S. Supreme Court on January 7, 1974.[58]

The most recent case of interest here is that of the Illinois supreme court which upheld an Illinois statute making it a crime to "publicly mutilate, deface, defile or defy, trample or cast contempt upon" an American flag. Three girls (two Augustana College students and one high school student) were convicted under this statute of burning a U. S. flag in front of the federal building in Rock Island, Illinois, May 5, 1970, as an act of protest against the shooting of students at Kent State University in Ohio on the preceding day, and the expanding military involvement of the United States in Indochina.[59]

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58. *Circular Letter No. 2*, January 23, 1974, of the National Association of State Universities and Land-Grant Colleges.

59. Compare this case with the very similar one of *Crosson* v. *Silver*, (U.S.D.C.,Ariz.) 319 F.Supp. 1084 (1970), wherein a U. S. District Court held a similar Arizona statute unconstitutional and void.

On April 26, 1976 the U. S. Supreme Court declined to review, and thus let stand, the judgment of the Illinois supreme court, saying the case presented no substantial federal question. This opinion was not unanimous. Justices Brennan, Marshall, and Stevens dissented, believing the court should hear arguments on the case and decide it. The division of the court on this matter seems to be a clear illustration of the cleavage between the conservative justices who are inclined to think the federal courts should be reluctant to disturb state court decisions, and the more progressive Justices who believe the federal constitutional rights of individuals should readily outweigh any repugnant features of state statutes or state court decisions. The key issue here was whether the flag-burning actually posed a threat of immediate violence. Attorneys for the girls said: "It is demeaning to suggest that a people capable of forging the freest society the world has known are incapable of restraining themselves from violently attacking three teen-aged girls. We are not a nation of vigilantes."[60]

20. EXECUTIVE, JUDICIAL, AND GRAND JURY OVERKILL

Little need to be said here. Currently the news media carry accumulating evidence that during the recent years of widespread student unrest various federal agencies of intelligence and security overstepped their lawful missions and carried on covert spying and techniques of entrapment against students and selected faculty members on campuses. State and local police sometimes allowed themselves to be involved in similar tricks of espionage.

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60. Reported in an Associated Press dispatch in the *Daily Pantagraph* of Bloomington-Normal, Illinois, April 27, 1976.

In 1975 the supreme court of California, in an eloquent and well-documented opinion by Justice Mathew O. Tobriner, declared: "The presence in a university classroom of undercover officers taking notes to be preserved in police dossiers must inevitably inhibit the exercise of free speech both by professors and students. In a line of decisions stretching over the past two decades, the United States Supreme Court has repeatedly recognized that to compel an individual to disclose his political ideas or affiliations to the government is to deter the exercise of First Amendment rights."

Quoting from the concurring opinion of Mr. Justice Felix Frankfurter in the 1957 Supreme Court decision in *Sweezy* v. *New Hampshire*: "These pages need not be burdened with proof of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intrusion occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor. . . In these matters of the spirit inroads on legitimacy must be resisted at their incipiency."[61]

Continuing in his own words, Justice Tobriner added: "The crucible of new thought is the University classroom; the campus is the sacred ground of free discussion. Once we expose the teacher or the student to possible future prosecution for the ideas he may express, we forfeit the security that nourishes change and advancement. The censorship of totalitarian re-

61. *Sweezy* v. *State of New Hampshire*, 354 U. S. 234, 77 S.Ct. 1203, 1 L.Ed. 2d 1311 (1957); reversing *Wyman* v. *Sweezy*, 100 N.H. 103, 121 A.2d 783 (1956).

gimes that so often condemns developments in art, science and politics is but a step removed from the inchoate surveillance of free discussion in the university; such intrusion stifles creativity and to a large degree shackles democracy."

Finally, a quotation from an English historian of the mid-nineteenth century, Sir Thomas Erskine May: "Next in importance to personal freedom is immunity from suspicions and jealous observation. Men may be without restraints on their liberty; they may pass to and fro at pleasure: but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators--who shall say that they are free? Nothing is more revolting. . . than the espionage which forms part of the administrative systems of continental despotisms. It haunts men like an evil genius, chills their gayety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency."[62]

The litigation which called forth this opinion was a taxpayer's suit for an injunction to order the Los Angeles Chief of Police to desist from unlawful expenditure of tax money to maintain undercover espionage of the campus, classrooms, and student organizations at the University of California at Los Angeles. The trial court had sustained a demurrer to the complaint (which is a plea that no cause of action has been stated, and obviates further proceedings). The California supreme court reversed that decision and remanded the case, declaring that a trial of the facts must be held.[63]

62. May, *Constitutional History of England*, Vol. 2 (1863), at p. 275.

63. *White* v. *Davis*, (Cal.), 139 Cal. Rptr. 94 (1975).

The long-drawn-out sequels of the unjustifiable slaying of four college students and the wounding of nine others by Ohio National Guardsmen at Kent State University May 4, 1970 make voluminous but dismal reading. The somewhat similar contemporaneous slaying of two students at Jackson State University in Mississippi had similar sequels.

As to Kent State, at first the U. S. Attorney General declined to convene a federal grand jury to assess any criminal liability of the Guardsmen; but after Watergate and appointment of a new Attorney General, a grand jury was convened and indictments brought on March 29, 1974 against eight members of the Guard detachment, for wanton deprivation of civil rights. After trial, U. S. District Judge Frank J. Battisti in early November 1974 gave a judgment of acquittal. Meantime the parents of three of the slain students had sued to recover damages (under 42 *U. S. Code* 1983 which authorizes federal suits for deprivation of civil rights against persons acting under color of state authority), but their suit was dismissed by U. S. District Judge James Connell, ruling that the suit, though against named individuals, was in fact a suit against the state by citizens of other states, as prohibited by the Eleventh Amendment. The Sixth Circuit U. S. Court of Appeals affirmed; but this was reversed April 17, 1974 by the U. S. Supreme Court,[64] and remanded for further proceedings.

The beginning of the next chapter was a civil suit for large sums in damages by parents and the surviving wounded students against the governor of Ohio and 43 other defendants. The trial began in

64. *Scheuer and Krause* v. *Rhodes*, 94 S.Ct. 40 L. Ed. 2d 90 (April 17, 1974).

May 1975 and concluded in September 1975 with a jury verdict exonerating all defendants.[65] In May 1976 the American Civil Liberties Union initiated an appeal to the Sixth Circuit U. S. Court of Appeals, which was pending at this writing.

65. "Last Act at Kent State." *Time*, September 8, 1975, p. 11.

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